SOUTHERN BANK BHD.

v.

TOH CHOE BENG & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 1320A/84]
24 NOVEMBER 1986

CIVIL PROCEDURE: *Appeal by guarantor against decision of Senior Assistant Registrar granting leave to plaintiff to sign judgment on O. 14 application - Appeal dismissed - Judgment sum reduced - Reasons for doing so - Issues raised by guarantor - Whether for the mere purpose of delay.*

The learned Judge had earlier dismissed an appeal by Lee Ah Chor, the 7th defendant/ appellant ("the guarantor") against the decision of the learned Senior Assistant Registrar granting leave to the plaintiff to sign judgment on an O. 14 application. In doing so, the learned Judge had reduced the judgment sum from RM1,311,792.85 with interest thereon to RM700,000 with interest thereon.

The plaintiff had claimed against the guarantor on the basis of a letter of guarantee dated 6 January 1982, whereby, in consideration of the plaintiff giving credit to a 3rd party, Sin Hup Woh Transport and Trading Agencies Company Sdn. Bhd. (the debtor"), the guarantor agreed to guarantee the plaintiff by paying on demand all money due and owing by the debtor to the limit or extent for principal of RM700,000. On the date of the hearing of the application, the outstanding sum due from the debtor was said to be RM1,311,798.85, and a defence had already been filed by the guarantor.

In his defence, the guarantor denied the execution of the said letter of guarantee, knowledge of and any sum having been lent to the debtor, and called for strict proof. The guarantor further averred that the claim against him was bad or premature in law.

Held:

[1] On an O. 14 application, a defendant should show cause by satisfying the Court that there are triable issues. Triable issues must give rise to a real substantial question to be tried. In this connection, such application will be allowed when it is considered inexpedient to allow a defendant to defend for mere purpose of delay.

[2] Although quite a number of issues were raised by the guarantor but whether the guarantor had satisfied the Court that they were triable depended not necessarily on the number of such issues but on the quality of such issues. The learned Judge was of the view that no substantial question was raised that amounted to a defence on the merits and it would be quite unjustifiable to subject the parties involved to more costs and expenses. Moreover, the issues raised by the guarantor were raised for the mere purpose of delay.

[3] The judgment sum was reduced to RM700,000 with interest thereon at the end of the hearing because the limit of the guarantor's liability for principal was expressly set at RM700,000.

Cases referred to:

Codd v. Delap [1905] 92 LT 510
Jones v. Stone [1894] AC 122
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212

In re Hubback [1905] P 129
In re De Rosaz 2 PD 66
Sandamani v. Spalding 12 CLR 63
Rozario v. Haribellah A [1927] N 195; 100 IC 194
Valla Bin v. Sidaji Bin 5 BHC 87

Legislation referred to:
Contracts Act 1950, ss. 86, 87, 92
Evidence Act 1950, ss. 68, 92, 93, 95

For the plaintiff - Lim Seong Chun; M/s. Lim Seong Chun & Co.
For the 7th defendant - I. Raj; M/s. Raj Selva & Co.

JUDGMENT

Peh Swee Chin J:

I have earlier dismissed an appeal by the 7th defendant/appellant, (hereinafter called guarantor), against the decision of the learned Senior Assistant Registrar granting leave to the plaintiff to sign judgment on an O. 14 application but in doing so, I have reduced the judgment sum from RM1,311,792.85 with interest thereon to RM700,000 with interest thereon. I now give my grounds of decision.

The plaintiff had claimed against the guarantor on the basis of a letter of guarantee dated 6 January 82, whereby, in consideration of the plaintiff giving credit to or lending to a 3rd party, called Sin Hup Woh Transport and Trading Agencies Company Sdn Bhd., (herein after called the debtor), the guarantor agreed to guarantee the plaintiff by paying on demand, all money due and owing by the debtor, among other things, to the limit or extent, for principal, of RM700,000. On the date of the hearing of the application, the outstanding sum due from the debtor was said to be RM1,311,798.85, and a defence had already been filed by the guarantor.

It will be pertinent to refer to the defence. The guarantor denied, by the defence, the execution of the said letter of guarantee; the knowledge of and any sum having been lent to the debtor, and called for strict proof. The guarantor further averred that the claim against him was bad or premature in law.

The guarantor showed cause by affidavit, (encl. 33), answering to the affidavit made by one Wong Kim Meng who had described himself as the credit officer of the plaintiff, (bank), filed in support of the O. 14 application. The following matters were raised by the guarantor:

(1) He did not know Wong Kim Meng aforesaid, who did not attest his alleged signature to the alleged letter of guarantee.

(2) He denied signing the said letter of guarantee; he did not know that plaintiff had lent money to the debtor, or how much plaintiff had lent to the debtor, and that his signature on the letter of guarantee was a forgery.

(3) He had never seen the person who signed as an attesting witness to the letter of guarantee.

(4) While the claim for interest was at 16% p.a., yet this rate of interest was not stated in the letter of guarantee and the fact that the rate of interest was left blank, threw doubt on the genuineness of the letter of guarantee.

(5) Certain properties to the value of RM2 million had been charged to the plaintiff to secure the money lent to the debtor and the plaintiff had filed a charge action but no account of it had been given to the guarantor.

(6) Plaintiff had kept on increasing the amount of money lent to the debtor and obtained further guarantee for the same from other persons without telling him; and the execution of such further guarantee had revoked impliedly or discharged the alleged letter of guarantee from the guarantor.

(7) The limit of the guarantee was RM700,000 but the claim was for RM1,311,792.85.

(8) He relied on ss. 86, 87 and 92 of the Contracts Act.

(9) The letter of guarantee referred to the debtor as "Sin Hup Woh Transport and Trading" but in the statement of claim, the debtor was referred to as "Sin Hup Woh Transport and Trading Agencies Co. Sdn. Bhd. "It could be a clerical error but the letter of guarantee must be rectified first.

I pause to observe that the aforesaid sections of the Contracts Act, were quoted without any specific reference to any facts of this case to show how such sections applied to them. Having regard to the somewhat complicated nature of the provisions in the said sections, such mere mention of such sections in this manner would therefore be of doubtful value.

The following matters were raised by the plaintiff:

(1) That the witness to the guarantor's signature to the letter of guarantee was Yeoh Cheang Wah, the then manager of the plaintiff and that, Poh Lin Chuan, the deponent of affidavit dated 20 May 1986 and filed for the plaintiff, himself saw the guarantor sign the letter of guarantee before the said manager.

(2) The rate of interest was left blank in the letter of guarantee because it was explained to the guarantor that it fluctuated and the guarantor had understood it and then signed it.

(3) No money had been realized from the foreclosure proceedings and that it was not obligatory for the plaintiff to keep the guarantor informed about the position or amount of the money lent from time to time or about any further guarantee from other guarantors. The limit of the guarantor's liability was fixed and since the debtor required more loan of money, the plaintiff had required more guarantors for the increased amount of money lent.

(4) By Clause 4 of the said letter of guarantee, the limit of the guarantor was to be cumulative with the limits of other letters of guarantee signed by other guarantors.

(5) The guarantor was a director of the debtor at the time when he signed the letter of guarantee.

(6) The name of "Sin Hup Woh Transport & Trading" was a typing error and that it should be "Sin Hup Woh Transport & Trading Agencies Co. Sdn. Bhd." as could be seen in a letter exhibited by the guarantor himself and marked as "L1" referred to in the guarantor's affidavit. The loan was given to the Sin Hup Woh Transport & Trading Agencies Co. Sdn. Bhd.

Learned Counsel before me submitted, that because of the error of the name, the letter of guarantee, was defective. Because the rate of interest was left blank; s. 93 of Evidence Act "protected the blank from being filled in". Please compare this submission with his client's complaint that it threw doubt on the genuineness of the letter of guarantee. Learned Counsel had stated that the interest rate was 16%. The attesting witness, manager of the plaintiff should be called to give evidence by virtue of s. 68 of the Evidence Act. The subsequent guarantee was not signed by the guarantor, but by other guarantors and this was not explained.

In reply, learned Counsel for the plaintiff submitted as follows. About the wrong name, it was a clerical error, and about the rate of interest being left blank, the guarantor by Clause 1 of the letter of guarantee had agreed to pay "interest at your usual rate or rates". The rate was not fixed because it was going to vary and fluctuate from time to time. The guarantor should not concern himself with the subsequent guarantee to the limit of RM900,000 not signed by him.

On an O. 14 application, a defendant should show cause by satisfying the Court that there are triable issues. Triable issues must give rise to a real substantial question to be tried. Please see *Codd v. Delap* [1905] 92 LT 510, and in this connection, one bears in mind that such application will be allowed when it is considered inexpedient to allow a defendant to defend for mere purpose of delay. Please see *Jones v. Stone* [1894] AC 122. I now refer to issues raised by the guarantor which ought to be considered also in the light of what has been stated.

First, the guarantor denied signing the letter of guarantee; denied knowledge of the loan of money to the debtor, of the existence or presence of the attesting witness, stating that his signature on the letter of guarantee was a forgery. All these amounted to a mere denial, and further, those allegations were highly improbable at the same time because the guarantor was a director of the debtor/company and the guarantor had himself exhibited a letter marked as exhibit "L1" as annexed to his own affidavit. That letter was addressed to the debtor, advising the debtor of the approval of the loan applied for by the debtor, setting out, *inter alia*, the requirement for directors of the debtor, (expressly including the mention of the name of the guarantor), to guarantee the repayment of such loan. As a director of debtor/company, it is quite impossible for him not to have known of the loan to the debtor, and this Court was not bound, to quote Lord Diplock's *dictum* in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212, to accept uncritically, as raising a dispute of fact, which called for further investigation, any statement on an affidavit, however equivocal, or inconsistent with undisputed contemporary documents, or inherently improbable in itself, that statement was.

Next, about the rate of interest left blank in Clause 4, a short answer was that the guarantor in his letter of guarantee, had stated he would pay on demand, *inter alia*, all such "interest at your usual rate or rates". The rate of interest would be varying irregularly or rising and falling. Further, affidavit of the credit officer of the plaintiff filed in support of the O. 14 application referred to interest of 16% as on date O. 14 application, being paid. In the absence of any evidence to the contrary, interest at this rate or any other previous rates, must have been paid without any protest at all by the debtor. In any event, from the affidavits filed on behalf of the plaintiff, the allegation that the reason for leaving the rate of interest blank was explained to the guarantor who understood it, who then agreed to it and signed the letter of guarantee. This was not specifically denied by the plaintiff, though its denial was presumed to be covered by the general denial of the guarantor, i.e. for example, that his purported signature to the letter of guarantee was forged. A general denial is not good enough without condescending upon particulars.

As-a-matter-of-factly, the guarantor in his affidavit and his Counsel in his submission, mentioned that the rate of interest was 16% p.a. Nobody was therefore in the dark about the actual rate of interest. Yet, Counsel relied on s. 93 of the Evidence Act to shut out the evidence of the rate of interest because the rate of interest was left blank in Clause 4 of the letter of guarantee. Learned Counsel had not suggested in what way this tiny blank space would preclude the plaintiff from recovering money lent, for principal to the extent of

RM700,000. This had the appearance of raising an issue for the sake of raising an issue with such issue lacking any *bona fides* in the circumstances of this case. It would still be dealt with.

Still on the question of the rate of interest that was left blank in Clause 4 of the letter of guarantee, it is desirable to further comment on it though prompted by a mere mention of s. 93 of the Evidence Act.

First, there was, in fact, no true ambiguity of any kind at all in Clause 4, for, though the rate of interest was left blank in Clause 4, it was mentioned in Clause 1. Construing a document is but a gathering of the maker's intention from the language of such document, and it is not, in my view, permissible to gather such intention from one sentence or one phrase of such document, but the whole of such document must be looked at for its true effect. The innocuity of the blank in Clause 4 can be even seen more clearly by an example or analogy, for example, if a vendor claims price of a house sold, and if Clause 3 of such sale agreement leaves the actual price blank when it mentions simply the price RM but Clause 2 of same agreement mentions RM100,000 as the price, can there be a real patent ambiguity? Can the evidence of the actual price of RM100,000 mentioned in Clause 2 be shut out? Does it render the agreement void for uncertainty? The rhetorical questions, I hope, are in order here and the answer to each of them is an unhesitatingly negative one.

The position would have been different here if Clause 1 herein did not mention about the rate of interest. Assuming the rate of interest was not mentioned anywhere at all except in Clause 4, so that the intention about the rate of interest could only be gathered from Clause 4, then the blank here would be, in fact, partial, i.e., interest was mentioned but the rate was not, then evidence would still be admissible, as it would be a latent ambiguity. Please see *In re Hubback* [1905] P 129 and *In re De Rosaz* 2 PD 66.

Secondly, the reason for having the space meant for the rate of interest left blank was contemporaneously with, or just before the signing of the letter of guarantee, explained to the guarantor by an officer of the plaintiff and the guarantor had agreed to it and then signed it. This specific allegation was not specifically denied by the guarantor. In this connection, proviso (b) of the s. 92 of the Evidence Act, would apply. The said proviso (b) is a specific as compared with the general nature of s. 93 and prevails over the latter even assuming that there was a patent ambiguity though I have just given reasons for saying that there was no such patent ambiguity at all. The proviso (b) to s. 92 and s. 93 of the Evidence Act are set out below for convenience:-

> Section 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved accordingly to s. 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
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> Provided that:
>
> (a) ...
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> (b) The existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document;
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> Section 93. When the language used in a document is on its face ambigious or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Please see illustration (f) to the said proviso (b) which speaks of evidence being admissible to show that the goods were bought on credit for a term which has not expired though a letter of order for goods says nothing about the time of payment. Please see *Sandamani v. Spalding* 12 CLR 63, for allowing a verbal agreement to pay interest to be proved when a pro-note was silent on interest. A *fortiori*, in the instant case when the payment of interest was mentioned in Clause 4 and other clauses. Please see *Rozario v. Haribellah* A [1927] N 195; 100 IC 194 for allowing oral evidence of a separate agreement to pay interest, when a bond was silent on interest. By virtue of the said proviso (b), the objection about the rate being left blank should for this reason also be dismissed.

Thirdly, the fact that interest was paid and accepted, after signing of the letter of guarantee, then, even assuming that the rate of interest was not mentioned at all in Clause 1, and assuming further that no officer of the plaintiff had ever explained the rate of interest to the guarantor who had never agreed to such omission; that fact of such subsequent payment of interest would be relevant under the proviso (d) to s. 92 of the Evidence Act which reads as follows:

> Section 92 (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

Similarly, the proviso (d) being a specific, prevails over the general nature of the provision contained in s. 93 assuming there was indeed a patent ambiguity, (while there was none).

A few parting words on the question of rate of interest, about the words:- "interest at your usual rate or rates" set out in Clause 1 which I have said, would render harmless the non-mention of the rate of interest, or the blank space for the rate to be inserted, for the interest mentioned expressly in Clause 4; these words, in my view, are a classic example of a latent ambiguity for which evidence is always admissible to explain. Section 95 of the Evidence Act, is relevant and reads as follows:

> When a language used in a document is plain in itself but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Thus when a written agreement provided for delivering a quantity of grain at a particular time, evidence could be given to show what kind of grain the contracting parties had in mind, please see *Valla Bin v. Sidaji Bin* 5 BHC 87.

I next deal with the issue that the plaintiff had failed to keep the guarantor informed about the charge of RM2 million worth of land to the plaintiff, there was nothing in the letter of guarantee imposing such an obligation on the plaintiff and under Clause 6, the guarantor was bound anyway to accept any certificate signed by the plaintiff's manager about any amount due as conclusive. Further, the debtor could not have refused to co-operate with the guarantor for refusing to divulge any such information to the guarantor.

I now deal with the issue of the failure of the plaintiff to tell the guarantor about the increase of amount of money lent to the debtor, similarly, there was no such obligation imposed, and further, Clause 5 rendered it harmless by providing that the guarantee should not be affected by any money lent beyond the limit of the guarantee.

About ss. 86, 87 and 92 on which I have commented earlier, they posed a puzzle to the Court. I found nothing obviously or by very clear implication, (any subtle or doubtful implication excepted) that could be attracted to the said sections, in all the circumstances of the case, including the clauses of the letter of guarantee themselves.

On the issue of the error of the name of the debtor, evidence from guarantor's own affidavit admitted or suggested that it could be a typing error. The guarantor must have been aware of such typing error, and could not have been misled in the least by the identity of the debtor for it was the guarantor who exhibited a letter from the plaintiff marked as Exhibit "L" which showed the correct name of the debtor. The guarantor, was aware of the true name of the debtor at all times, and the guarantor could not possibly be misled or prejudiced in any way at all.

Although quite a number of issues were raised by the guarantor but whether the guarantor had satisfied the Court that they were triable, depended, not necessarily on the number of such issues, but on the quality of such issues. To use an American expression, 'at the bottom line', no real substantial question was raised, such that it would, in my view, amount to a defence on the merits and it would be quite unjustifiable to subject parties here to more costs and expenses. One could not suppress an impression, when listening to the issues being raised that they were raised for the mere purpose of delay.

A word about the judgment sum being reduced to RM700,000 with interest thereon at the end of the hearing of appeal; the limit of the guarantor's liability for principal, was expressly set at RM700,000, in consequence, the judgment sum was reduced accordingly.

I therefore upheld the decision of the learned Registrar and allowed the appeal with costs.

Also found at [1986] 2 CLJ 467